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In the Supreme Court of the United States

October Term, 1971

No. .....

WILBUR DEAN and DELORES DEAN,
and
ONE 1965 BUICK, etc., *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Wilbur Dean and Delores Dean, pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals, for the Sixth Circuit, made herein on February 16, 1972.

OPINIONS BELOW

The order of the Court of Appeals to which this petition is directed is designated Appendix "A", *infra*, at page A1. The original opinion by the Court of Appeals is officially reported at 392 F.2d 672. Rehearing denied 397 F.2d 782. These opinions are designated Appendix "B" and "C", at pages A2 and A15. This Court's judgment granting certiorari vacating the judgment and remanding the case was reported at 402 U.S. ..... It is set forth herein as Appendix "D", *infra*, at page A18. The order of

the Court of Appeals following remand is Appendix "E". It appears at page A19. The District Court's order in response thereto is Appendix "F", *infra*, page A20.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals having been finalized on February 16, 1972, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether the 1965 seizure of property incident to the arrest of a citizen for failing to have a wagering occupational tax stamp, or a seizure incident to the execution of a search warrant based on a failure to have the occupational tax stamp, can be deemed constitutionally permissible in view of the decisions by the United States Supreme Court in *Marchetti, Grosso,* and *United States Coin and Currency.*

II. Whether upon remand of a case in which a judgment forfeiting to the government certain physical property was vacated by the Supreme Court, the District Court can permit the Government to dismiss their libel petition and thus deprive the claimants of a final judgment restoring the seized property to its rightful owners.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF FACTS

I

Wilbur and Delores Dean, the appellants herein, are claimants to the considerable sum of money involved in this appeal. This money was originally seized on April 5, 1965, incident to the execution of a search warrant at their home in Cleveland, Ohio, and incident to the arrest of Wilbur Dean. This arrest was made in the driveway after he had emerged from his car.

The District Court, as a previous opinion by this Court shows, "found that the allegations contained in the libel were sustained by the evidence [—that is, that the seized property was being used or was intended for use in violation of a wagering tax statute], and ordered the property condemned by decree of forfeiture and turned over to the United States" (App. 77).[1] This Court further recognized that the District Court had also denied the motion whereby the suppression and return of this property was sought (*ibid*). This motion was, of course, filed under favor of Rule 41(e) of the Rules of Criminal Procedure (App. 13-18).

On appeal the Court of Appeals rendered two opinions[2] (See Appendixes "B" and "C") both of which were against these petitioners. The first of these simply rejected the contention that *Marchetti* and *Grosso* required a reversal of the District Court's judgment. The next opinion, which mirrored this Court's position as conflicting with the Seventh Circuit's decision in *United States v. United States Coin and Currency*, 393 F.2d 499 (7th Cir., 1968),

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1. References to the Appendix (filed in the Court of Appeals) are designated App. .....

2. *United States v. One 1965 Buick*, 392 F.2d 672, and 397 F.2d 782 (6th Cir., 1968).

denied petitioner's rehearing. To be sure, this conflict was, of course, resolved by this Court's affirmance of the Seventh Circuit's decision in *United States v. United States Coin and Currency*, 401 U.S. 715 (1971).

Given the *Coin and Currency* decision, certiorari was granted this case,[3] and this cause remanded to the Sixth Circuit (Appendix "D") and in turn by that Court to the District Court (Appendix "E").

Following remand, the District Court, over the opposition of the appellants, *specifically* ruled that there had been probable cause for the original seizure of the property (Appendix "F"). Further the Court, at the behest of the Government, ruled that the Marshal should turn the money over to the Internal Revenue Service pursuant to the levy filed on June 28, 1971 (*ibid*). The record shows this latter ruling to be subsequent to the Government's notice of both this Court's and the Sixth Circuit Court's disposition of this case in the wake of the *Coin and Currency* decision of April 5, 1971. The cars, which had seriously depreciated from the date of their seizure in 1965 to the date of the District Court's Order (Appendix "F"), were awarded to the claimants. The fact that these cars had seriously depreciated apparently did not even inspire the Court to suggest that maybe some type of credit should be allowed for this.

In any event, since the Government's motion has to be regarded as a concession that the Deans had been illegally deprived, during the intervening years, of the beneficial use of the cars, it does seem only fair that some consideration for this was at least indicated.

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3. 402 U.S. 937 (1971).

II

The Government's position (which was successfully urged in the District Court as entitling them to the order being challenged by this appeal) simply put, is that although their levy—based as it is to a large degree on assessments, taxes that accrued, and penalties calculated—was filed subsequent to a seizure they now admit was illegal when made, they can apply the monetary portion thereof in partial satisfaction of this asserted tax liability. The fact that the Government both illegally acquired this property, and wrongfully deprived the claimants of the possession and beneficial use thereof for more than six years, is apparently being deemed by them to be beside the point.

The true depth of this dogmatic position is readily gleaned from the argument made to the District Court which comes close to saying the Government is entitled to absolution for the wrongs done the Deans. Here reference is made to their statement that the Government "has no sympathy for the claimants" (App. 97). In this regard, one must truly wonder: Whatever happened to the doctrine that he who seeks equity must do equity.

ARGUMENT

I

Whether the 1965 seizure of property incident to the arrest of a citizen for failing to have a wagering occupational tax stamp, or a seizure incident to the execution of a search warrant based on a failure to have the occupational tax stamp, can be deemed constitutionally permissible in view of the decisions by the United States Supreme Court in Marchetti, Grosso, and United States Coin and Currency.

Doubtless as was conceded in their *Motion to Dismiss and Motion for Distribution of Seized Property* (App. 90),

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[1]390 U.S. 39.

[2]390 U.S. 62.

the Government was aware that the Supreme Court's *Coin and Currency* decision of April 5, 1971, had doomed their contention that the seizure of the Deans' property was valid. The Government's response to this was to levy on the liquid segment of this seized property in an all-out effort to defeat the right not only of the Deans to the possession of this property, but also any other legal and equitable interest, or rights, that may have been vested in others—including counsel.

Simply put, therefore, the question must be whether this can be done over claimants' insistence that they are entitled to have their right to possess this money measured on the basis of a strict application of the *Coin and Currency*[4] decision; as well as, the *Grosso*[5] and *Marchetti*[6] principles, to the facts and circumstances involved in the original seizures. Given a retroactive thrust, *Marchetti*, and *Grosso* make it clear that no warrant could validly be issued to search for evidence to prove a violation of the statutes here involved.

Arguably, a considerable obstacle to the acceptance of our contentions, in this regard, is our circuit's opinion in *United States v. Tiktin*, 427 F.2d 1027 (1970); as well as, comparable views expressed by several other courts. The latest of these being the Second Circuit in *United States v. Armiento*, 445 F.2d 869, 9 CrL 2314 (6/7/71). The thrust of these decisions is that the admissibility of evidence seized under a warrant alleging violations of the registration requirements of the wagering tax law is not affected by the fact that the *Marchetti* and *Grosso* decisions have made a successful prosecution for any such violation only a most remote possibility.

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4. *United States v. United States Coin and Currency*, 401 U.S. 715 (1971).

5. *Grosso v. United States*, 390 U.S. 62 (1968).

6. *Marchetti v. United States*, 390 U.S. 39 (1968).

As to the Court's *Tiktin* opinion, it is of interest to note that the one of its premises was the fact that, unlike our case, there was no contention "that the search warrants, issued on the ground of violation of the federal wagering tax laws, were in any way defective" (*United States v. Tiktin*, 427 F.2d, at 1029). So structured, it is apparent that *Tiktin* is readily distinguishable. But even that is not all. The further question in *Titkin* was whether the seized evidence "should be suppressed in a prosecution under the anti-racketeering statute" (*ibid*); whereas, here the question is whether the seized property can be used as the basis for a tax assessment, and then the money portion thereof applied in partial satisfaction of a levy filed in response to such assessment. To be sure, in our judgment, these issues cannot be resolved on the basis of *Tiktin*.

Thus, the view taken here is that if *Marchetti* and *Grosso* because of the self-incrimination aspect of the registration requirements, would bar a successful criminal prosecution for alleged violations of the wagering tax statutes, it can only follow that the same constitutional prohibition would bar a search warrant for the same evidence.

Consider in this regard, *Hill v. Philpott*, 445 F.2d 144 (7th Cir. 1971). In *Hill*, the Court, relying on the *Coin and Currency* decision, *supra*, ruled that the Government could not "avoid all Fifth Amendment considerations by merely obtaining a search warrant" (*id*, at 149), and that property that could not have been properly obtained by subpoena, or summons, in face of an assertion of the Fifth Amendment, could not be lawfully obtained on the basis of a search warrant.

This same distinction was recognized by our District Court in response to the question (as stated by them) as to "whether the Government has a right to seize one's per-

sonal papers, pursuant to a search warrant, when the effect of such seizure would be to compel one to testify against himself". The Court's answer to this question was to uphold a gambler's assertion of the Fifth Amendment and rule that his books and records were immune from seizure. See *United States v. Blank,* 330 F. Supp. 783, 9 CrL 2513 (N.D.Ohio, 8/27/71).

Significant here, in *Blank,* the Court held that *Marchetti* and *Grosso* likewise provided, as we contend here, a further basis for recognizing the cogency of the assertion of the Fifth Amendment in situations such as this.

In our view, these arguments require the resolution of this question in favor of the appellants.

II

Whether upon remand of a case in which a judgment forfeiting to the government certain physical property was vacated by the Supreme Court, the District Court can permit the government to dismiss their libel petition and thus deprive the claimants of a final judgment restoring the seized property to its rightful owners.

Distilled, the Government's position is that they should be absolved for having illegally seized the Deans' property and money because, after all, they are willing not only to give the Deans full credit for the money seized on their tax bill, but to award them the grievously depreciated cars. As to the tax bill, they calculated it to be $150,000 owed for personal income tax which, according to them, became "obligated prior to April 5, 1965." This statement, of course, is at best only technically accurate. The $150,000 they refer to encompasses money earned in separate years—1964 and 1965. Further, on the date of the seizure, April 5, 1965, the tax return for *1964* income was yet to fall due.

And, of course, the amount of tax due for *1965* could not possibly have been known in April of that same year—that is, April, 1965.

Next, and herein lies the hub of our contentions, the Government has argued that in addition to the $150,000 owed by the Deans for personal income taxes, they owe an even greater sum for "the 10% tax on wages imposed by section 4401 of the Internal Revenue Code of 1954" which "incurred prior to April 5, 1965" (App. 96). These figures are, to be sure, the Government's figures, and history shows they are always exaggerated. Doubtless their penchant for so doing is based on the assumption they can do this with impunity.

Despite this, it cannot be overlooked that no matter how correctly these calculations *may* be, the fact remains the Government's calculations are based on records seized from the appellants' home on April 5, 1965. It can only follow then that if the seizures were illegal, the use of those records as a basis for the Government's calculations is prohibited. *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920).

Of further significance here, the Government concedes to being mindful of counsel's "interest in the money in exchange for services rendered prior to either the assessment or the levy" (App. 98). Yet, they would distinguish this situation from those cases where a fund is created by counsel's efforts such as would entitle us to an equitable lien having priority over their levy (*ibid*).

Contrary to this contention, our view is that under the facts of this case as such distinction should not suffice to override the fact that the Deans' right to possession and counsel's vested interest, cannot be compromised on basis of facts occurring subsequent to the date it was determined

either that the seizure was invalid, or that as claimants the Deans were entitled to prevail in the forfeiture case.

Thus, we contend here for the conclusion that a District Court cannot, by the simple expedient of dismissing on the Government's motion, a six year old forfeiture case (which had been remanded by the Supreme Court and the Court of Appeals), deprive the claimants of their possessory rights by ordering the seized property turned over to the Internal Revenue Service on the basis of a levy filed after the case had been remanded.

CONCLUSION

Truly, it must be, as was argued to the District Court, unthinkable to believe that the Government can with impunity arrest its citizens, seize their property, hold it for years, force them to expend considerable sums of money to vindicate their rights to possession; and then in face of being forced to recognize the unconstitutional aspects of the original seizure, avoid returning this property by the simple device of dismissing the forfeiture case, and then claiming as a basis for confiscating the same property a levy filed more than six years after the original seizure.

Surely, due process requires that our government be fairer than this. For, even if it is true that the Deans were engaged in a gambling enterprise, the fact remains this activity cannot, by the controlling tenets, be viewed as a justfication for the original seizure. This is so because the federal statutes do not prohibit gambling enterprises such as has been imputed to the Deans. Such being the case, the only federal interest could be the right to tax the enterprise. This limitation makes the seizures here a clear violation of the Fifth Amendment.

Such being the case, it can only follow that this Court's ultimate judgment should require the Government to refund this property to the petitioners.

RELIEF

For the reasons set forth above, petitioners submit this Court should reverse the judgment of the Court of Appeals. More specifically, the Court should, by appropriate order (1) direct the reinstatement of the original libel case and facilitate the awarding of the property seized to the claimants; (2) The Court should, further, reverse the judgment of the Court of Appeals, whereby denial of petitioners' Motion for the Return of Illegally Seized Property was affirmed. In this latter regard, the property seized from the home of the Deans should be ordered returned to them, and the Internal Revenue Service should be enjoined from using any records so seized in any computations designed to determine taxes owed by the Deans.

Respectfully submitted,

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APPENDIX A

Unpublished Order of the Court of Appeals

(Filed February 16, 1972)

No. 71-1744

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ONE 1965 BUICK, etc., *et al.*,

Defendants,

WILBUR DEAN and DELORES DEAN,

Claimants-Appellants.

Before: WEICK, EDWARDS and MCCREE, *Circuit Judges.*

On consideration of the briefs and appendices and oral arguments in the above-styled appeal, the memorandum and order of the District Court, filed July 29, 1971, is hereby affirmed.

Entered by order of the Court

James A. Higgins

Clerk

APPENDIX B

Opinion of the United States Court of Appeals
For the Sixth Circuit

(Filed April 17, 1968)

No. 71-1744

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ONE 1965 BUICK, etc., *et al.*,
Defendants,

WILBUR DEAN and DELORES DEAN,
Claimants-Appellants.

Before WEICK, Chief Judge, EDWARDS and MCCREE, Circuit Judges.

WEICK, Chief Judge. This appeal involves questions arising out of the forfeiture of property used in the operation of a numbers business, in violation of the Internal Revenue laws.

The United States filed a libel of information in the District Court to condemn the property which consisted of $305,633.25 in cash, a package containing an unknown amount of currency, three Buick automobiles, and three adding machines.

The property had been seized by Special Agents of the Internal Revenue Service in a search of the residence of appellants, Wilbur and Delores Dean, pursuant to the

authority of search warrants which authorized the search of the residence and four automobiles.

The libel alleged that the Deans and other persons engaged in and carried on the business of accepting wagers without having first paid the special occupational tax imposed on such business, and without registering the business as required by law;[1] that while so engaged said property was used and was intended for use in violation of the Internal Revenue laws; and that by reason thereof, said property became and is the property of the United States under the provisions of Section 7302 of Title 26, U.S.C.

Appellants filed answers, denying the material allegations of the libel. They also filed a claim to the property. Wilbur Dean filed a motion to suppress, the ground of the motion to suppress being that the search and seizure were illegal, in violation of his Fourth and Fifth Amendment rights.

Pursuant to a stipulation of the parties, the motion to suppress and the trial of the libel were heard together. The trial lasted eight days, at the conclusion of which the District Judge delivered his opinion, which is contained in eleven pages of the printed record. He adopted

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[1]The applicable statutory provisions are as follows:

26 U.S.C. § 4411 provides in pertinent part:

"There shall be imposed a special tax of $50 per year to be paid by each person who . . . is engaged in receiving wagers . . ."

26 U.S.C. § 4412 provides in part:

"Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—. . ."

26 U.S.C. § 4901 provides in pertinent part:

"No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 . . . until he has paid the special tax therefor."

findings of fact and conclusions of law. He found that the allegations contained in the libel were sustained by the evidence, and ordered the property condemned by decree of forfeiture and turned over to the United States. He denied the motion to suppress.

It is contended on appeal that the federal wagering tax statutes, which formed the basis for issuance of the search warrants and seizure of the property sought to be forfeited, are unconstitutional.

An analysis of this claim must begin with the forfeiture statute itself. 26 U.S.C. § 7302 provides in part:

> "It shall be unlawful to have or possess any property intended for use in violating the provisions of the Internal Revenue laws, . . . and no property rights shall exist in any such property."

The primary purpose of the statute is the protection of the revenue through the effective enforcement of the revenue laws. *Florida Dealers & Growers Bank v. United States,* 279 F.2d 673, 676 (5th Cir. 1960); *United States v. One 1950 Ford Half-Ton Pickup Auto,* 195 F.2d 857, 859 (6th Cir. 1952); *United States v. Windle,* 158 F.2d 196, 199 (8th Cir. 1946). A reading of the language of the statute, in the light of the purpose for its existence, leads to the conclusion that it outlaws any property used or intended for use in violating the Internal Revenue laws and sanctions forfeiture thereof. However, if the wagering tax statutes are unconstitutional, as the appellants insist, then there would be no revenue law violation upon which to predicate the forfeiture.

When the case was tried in the District Court it was governed by two decisions of the Supreme Court, which upheld the constitutionality of the wagering statutes here involved. *Lewis v. United States,* 348 U.S. 419 (1955) and

United States v. Kahriger, 345 U.S. 22 (1953). Shortly before the appeal was argued, the Supreme Court decided *Marchetti v. United States*, ... U.S. ..... (1968) and *Grosso v. United States*, ... U.S. ..... (1968), in which convictions for violating the wagering statutes were set aside because they were in violation of the accused's Fifth Amendment privilege against self-incrimination.

Appellants rely on these decisions and contend that since they cannot be convicted on a criminal charge for violation of the wagering statutes if they assert their privilege against self-incrimination, their property ought not to be subject to forfeiture for the same violation. In our judgment this does not follow.

The mere fact that an exclusionary rule of evidence may prevent a conviction for the criminal offense of violating the Internal Revenue laws, does not expunge civil liability for payment of the tax.

There can be no question but that Congress has power to tax unlawful activities. The fact that a business is unlawful does not exempt it from payment of taxes. *United States v. Sullivan*, 274 U.S. 259 (1927).

The Supreme Court in *Marchetti* did not hold that the wagering tax statutes as such were unconstitutional. The Court endeavored to make crystal clear that Congress had the constitutional power to enact such legislation. In *Marchetti* the Court said:

> "The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases."

In *Marchetti* the Court further said:

> "We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful.
>
> ". . . Accordingly, nothing we do today will prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes.
>
> ". . . We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes."

Finally, appellant's contention is explicitly answered by the Supreme Court in *Grosso*, where the Court stated in footnote 7:

> "Section 4411 provides that the occupational tax must be paid 'by each person who is liable for tax under section 4401' and by each person who receives wagers for one liable under § 4401. It might therefore be argued that since petitioner is entitled to claim the constitutional privilege in defense to a prosecution for willful failure to pay the excise tax, he is thereby freed from liability for the occupational tax. We cannot accept such an argument. We do not hold today either that the excise tax is as such constitutionally

impermissible, or that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of privilege precludes a criminal conviction premised on failure to pay the tax."

The second ground for reversal urged by appellants is that there was not probable cause for issuance of the search warrants. Appellants argue further that even if on their face the warrants were sufficient, still they should have been allowed to show that in fact what the Commissioner did was to accept the conclusions of affiants, rather than arrive at an independent judgment.

Probable cause was established by supporting affidavits of five persons, four of whom were agents with the Intelligence Division of Internal Revenue Service, and the fifth person was a special employee working in an undercover capacity with the Service. The investigation which led to the issuance of the warrants began in October, 1964, and continued into April, 1965.

It is unnecessary to enumerate all of the facts in the affidavits which comprise twenty-two pages in the printed appendix. In substance, the affidavits disclose the following: During the investigation, special employee James Wilson placed numerous bets at Dean's House of Jazz, a record shop owned by the appellants, located at 8508 Hough Avenue in Cleveland, Ohio. These bets were placed with employees of the establishment, as well as with Mrs. Dean. On these and other occasions Wilson saw Mrs. Dean taking bets from other customers. He also observed other persons come into the shop and deliver quantities of bet slips and money to Mrs. Dean. Wilson also witnessed Mrs. Dean total bet slips, count money, and leave the shop with large envelopes containing bet slips and money. Wilson was advised by employees of the record shop that if he won a bet he could collect from Mr. Dean in the evening

at the record shop. On several occasions affiant saw Mr. Dean make payoffs to customers who had won bets. Wilson also placed bets at a residence across the street from the record shop, and on five occasions the wager was accepted by Mrs. Dean. On three occasions between October, 1964, and March, 1965, Wilson placed bets at a poolroom, one of which bets was accepted by a person whom the affiant had seen deliver bet slips and money to Mrs. Dean. On eleven occasions between January and March, 1965, Wilson placed bets at 1756 East 90th Street, and on several occasions he observed Mrs. Dean leave that location carrying large envelopes. On numerous occasions other agents saw men who were carrying brown paper bags and envelopes from the record shop, proceed to the Dean residence at 10915 Wade Park Avenue and disappear inside the residence. In all of these transactions, the same four automobiles were used, three of which are named in this action. On the basis of the above information, an agent appeared before the U. S. Commissioner and stated that he had cause to believe that the Deans were engaged in an illegal numbers operation at 10915 Wade Park Avenue, without the necessary occupational tax stamp, and that he further had cause to believe that the above residence concealed "numbers lottery tickets, adding machines, adding machine tapes, tally sheets, books and records, and other numbers paraphernalia."

Probable cause need be established only by a quantum of evidence that would suffice to persuade a reasonable man that a crime is being, or has been, committed. It deals with probabilities, and these probabilities are of the type upon which reasonable and prudent men are accustomed to act. When there is a known reasonable ground for guilt, there is probable cause. *Brinegar v.*

United States, 338 U.S. 160, 173-176 (1949), and *Carroll v. United States,* 267 U.S. 132, 161 (1925).

Evidence which would be deemed insufficient to sustain a conviction, may furnish the basis for probable cause, *Locke v. United States,* 11 U.S. (7 Cranch.) 339, 348 (1813); and the evidence may be of a character that would render it inadmissible at trial, *Draper v. United States,* 358 U.S. 307, 311 (1959). As the Court remarked in *United States v. Ventresca,* 380 U.S. 102, 108 (1965):

> ". . . [A]ffidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion."

The Court said further at page 109:

> "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

See also *United States v. Gosser,* 339 F.2d 102, 111 (6th Cir. 1964) *cert. denied,* 382 U.S. 819 (1965) (probable cause judged by reasonable man standard); *United States v. Woodson,* 303 F.2d 49, 50-51 (6th Cir. 1962) *cert. denied,* 373 U.S. 941 (1963) (anonymous telephone call coupled with agent's personal observation constituted probable cause); *United States v. Nicholson,* 303 F.2d 330, 332 (6th Cir.) *cert. denied,* 371 U.S. 823 (1962) (Commissioner's determination stands unless arbitrary).

By these standards it is difficult to imagine a stronger case, in which probable cause could be more emphatically established, than was stated in the partial recitation of the

supporting affidavits. We think appellants' argument that the Commissioner merely "rubber stamped" the papers which were submitted to him, without determining probable cause for himself, is refuted by the record which indicates that the Special Agents were at the Commissioner's home for about four hours before the warrants were issued. Appellants' attempt to show the mental processes of the Commissioner by cross-examination of a Special Agent, was fruitless. As we have pointed out, the affidavits clearly authorized the issuance of the search warrants.

In appellants' third ground for reversal they complain that they did not receive a full hearing in the lower court on their motion to suppress. The record reveals that appellants' attorney wished to call several witnesses relating to the alleged illegal search and seizure, but to have the use of their testimony restricted to the motion to suppress, with leave to recall these same witnesses during the portion of the proceedings directed at the merits. The trial judge agreed that the testimony of one witness, Mr. Dean, would be so restricted.

The literal terms of Rule 41(e) of Federal Rules of Criminal Procedure provide some guidance on this question. The rule provides that the court ". . . shall receive evidence on any issue of fact necessary to the decision of the motion." Hearings are not to be granted simply as a matter of course, but only when the allegations of the petition, if proven, would justify relief. *Grant v. United States,* 282 F.2d 165, 170 (2nd Cir. 1960). Furthermore, the claims must be supported by factual allegations; and mere conclusions will not suffice. *Cohen v. United States,* 378 F.2d 751, 760-761 (9th Cir.) *cert. denied,* 389 U.S. 897 (1967). Under these standards it is doubtful that

appellants' motion to suppress was sufficient to require a hearing, but inasmuch as the District Judge reached the merits of the motion, our review will be coextensive.

The import of the cases seems to be that while it is preferable to hold hearings on motions to suppress prior to trial, it is within the discretion of the District Judge to conduct such hearings at the time of the trial. *United States v. Phillips,* 375 F.2d 75, 78 (7th Cir.) *cert. denied,* 389 U.S. 834 (1967); *Battle v. United States,* 345 F.2d 438, 440 (D.C. Cir. 1965); *United States v. Stonehill,* 254 F. Supp. 1003, 1005 (S.D. N.Y. 1966). In any event, appellants specifically waived any objection which they might have had by stipulating prior to trial that the hearing might be heard contemporaneously with the merits.

The scope of inquiry permitted during a hearing on a motion to suppress is within the discretion of the District Judge. *Mulligan v. United States,* 358 F.2d 604, 608 (8th Cir. 1966). In the instant case the parties had agreed that the District Judge, sitting without a jury, would hear the merits of the libel and the motion to suppress, together. Appellants' counsel proposed to offer five witnesses in support of the motion. As to the most vital of these witnesses, Mr. Dean, the District Judge agreed that his testimony would be considered only in relation to the motion. As to the testimony of other witnesses, it was offered anyway, and the substance of their testimony was a denial of knowledge of any numbers activity at the appellants' residence and a contradiction of testimony of Government witnesses as to the circumstances of entry into the house on the day of the search. A review of the record fails to disclose any way in which the ruling of the District Judge could have prejudiced appellants in the presentation of their case. Nor have the appellants at any place in their briefs pointed out how they were prejudiced by the District Judge's con-

duct of the hearing. Under these circumstances, in our opinion the appellants received a full and fair hearing, and the District Judge's ruling was not error.

Appellants' fourth ground for reversal is that the trial judge's findings of fact were not supported by the evidence. Forfeiture actions are subject to the Federal Rules of Civil Procedure, and hence the District Judge's findings of fact may not be set aside unless clearly erroneous. Rule 52(a) F. R. Civ. P.; *United States v. One 1963 Cadillac Convertible Coupe,* 352 F.2d 338 (6th Cir. 1965).

In an action of this nature the Government has the burden of proving its case by a preponderance of the evidence. *One 1961 Lincoln Continental Sedan v. United States,* 360 F.2d 467, 469 (8th Cir. 1966); *Clift v. United States,* 350 F.2d 308, 310 (5th Cir. 1965); *United States v. Bride,* 308 F.2d 470, 473 (9th Cir. 1962). The District Judge made detailed findings of fact which disclosed the following: From October, 1964, through April, 1965, an employee of the Internal Revenue Service placed more than forty bets in the east Cleveland area. Almost all of these bets were placed with Mrs. Dean personally, with one of her employees, with someone with whom she had been seen working, or at a place where she had been seen taking bets. The last of these bets were placed on April 2nd, and the original of the bet slip was found at the Dean residence on April 5th. The Deans were seen by agents of the Internal Revenue Service engaging in almost every facet of the numbers business, including taking bets, counting money, compiling and transferring betting slips and money, and paying off winners. The three automobiles here involved were constantly observed during the investigation being used by the appellants and their employees in the betting operation. Although there was conflicting testimony, the District Judge found that the more

than $300,000, which was seized in the raid, constituted the "bank" for the illegal numbers business, and as such was subject to forfeiture as having been used to violate the Internal Revenue laws.

In our opinion, there was substantial evidence to support the findings of fact of the District Judge and they are not clearly erroneous.

Finally, appellants contend that the money was not listed in the search warrant and hence could not have been seized pursuant to that instrument. They further assert that the appellant, Mr. Dean, was arrested in his driveway, and the money was discovered at a point in the house remote from the arrest, and it is therefore impossible to justify seizure of the money as incident to a lawful arrest.

It should be pointed out that officers in conducting a search are not in all instances limited to the seizure of objects detailed in the warrant. *Johnson v. United States,* 293 F.2d 539, 540 (D.C. Cir. 1961), *cert. denied,* 375 U.S. 888 (1963). An item may be so closely related to the items detailed as to justify their seizure, i.e. where the item though not itself listed in the warrant, is an instrumentality for commission of the crime involved. See *Bryant v. United States,* 252 F.2d 746, 749 (5th Cir. 1958), and *Sanders v. United States,* 238 F.2d 145, 147 (10th Cir. 1956). In any event, the description in the instant warrant was sufficiently broad in scope to extend to the money here involved. The warrant issued for appellants' residence authorized a search for "numbers lottery tickets, adding machines, adding machine tapes, tally sheets, books and records, and other numbers paraphernalia."

As the Court said in *Nuckols v. United States,* 99 F.2d 353, 355 (D.C. Cir.), *cert. denied,* 305 U.S. 626 (1938):

> "In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods."

See also *Merritt v. United States*, 249 F.2d 19, 20-21 (6th Cir. 1957).

Our disposition of this point renders unnecessary a decision as to whether the money might have been seized validly, as incident to an arrest. There is no doubt that if the money was being used in an illegal business it was subject to forfeiture, as would be any other device for the commission of the crime.

In *United States v. Joseph*, 174 F. Supp. 539 544-545 (E.D. Pa. 1959), *aff'd*, 278 F.2d 504 (3rd Cir.), *cert. denied*, 364 U.S. 823 (1960), the Court, faced with the identical problem presented here, held that money was paraphernalia and equipment and subject to seizure.

As the Court observed in *United States v. Currency in Total Amount of $2,223.40*, 157 F. Supp. 300, 304 (N.D. N.Y. 1957):

> "A sufficient amount of cash to meet the demands of the trade appears to have been a necessary and closely related implement or facility of the wagering business as transacted here."

See also *United States v. United States Coin & Currency in the Amount of $8,674.00*, 379 F.2d 946 (7th Cir. 1967), and *United States v. $1,058.00 in U.S. Currency*, 323 F.2d 211 (3rd Cir. 1963).

The arrest did not take place in the driveway but inside the residence which was used as a "bank" and "count house."

Affirmed.

APPENDIX C

Opinion of the Court of Appeals on Petition for Rehearing

(Filed July 19, 1968)

No. 71-1744

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ONE 1965 BUICK, etc., *et al.*,
Defendants,

WILBUR DEAN and DELORES DEAN,
Claimants-Appellants.

Before WEICK, Chief Judge, EDWARDS and MCCREE, Circuit Judges.

WEICK, Chief Judge. Appellants ground their petition for rehearing on *Angelini v. United States,* ..... F.2d ..... (7th Cir. 1968).

We consider *Grosso* and *Marchetti* in a different "light" than did the Seventh Circuit. As we pointed out in our opinion, the Supreme Court limited its holding to criminal cases. The Court approved its previous decisions in *License Tax Cases,* 72 U.S. 462 (5 Wall.) (1866), and *United States v. Sullivan,* 274 U.S. 259 (1927), which upheld the power of Congress to tax unlawful activities. It is not for us to extend *Grosso* and *Marchetti* to civil cases and thereby exempt from taxation persons who de-

rive their income from unlawful activities because they assert their Fifth Amendment rights in a criminal case. There is such a thing as an obligation to pay the excise tax. Even though such a person may not be convicted for criminal violation, because of exclusionary rules of evidence, he still remains civilly liable for the tax.

The statute (26 U.S.C. § 7302) makes it unlawful to have or possess any property intended for use in violating the internal revenue laws, and no property rights exist in such property. The forfeiture action is in rem against the property so used. *Various Items v. United States*, 282 U.S. 577 (1931).

The evidence disclosed a large-scale numbers operation by the Deans using their residence as a "bank" and "clearing house." The "bank" consisted of wagers placed by bettors with the Deans and was a fund amounting to $305,632.25 in cash available to pay off the winners.

Mr. Dean told the agents, as the District Court found, that he was the banker and he did not pay the occupational tax or the ten percent excise tax. He gave as a reason for not paying the excise tax that he could not afford to pay it because it came off the top. The court further found that the funds in the "bank" did not belong to the Deans but were merely gambling money in their custody.

The District Court found that the property seized was intended to be used and was used in violation of the internal revenue laws. There was abundant evidence to support this finding and it justified the order of forfeiture. Lotteries are also prohibited by the Constitution of Ohio and Ohio statutes which impose criminal penalties for engaging in such activities. Art. XV § 6 Const. of Ohio; Ohio Rev. Code ch. 2915 (1953).

We do not regard *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), as apposite. It involved a search without a warrant which the state court determined was without probable cause. The forfeiture there depended upon the admission of illegally obtained evidence in violation of the Fourth Amendment as applied to the state by the Fourteenth Amendment. In the present case, the arrest was lawful and the search was pursuant to the authority of warrants which we have held to be valid. No illegally obtained evidence was admitted in the forfeiture proceeding. It is not necessary that there be a criminal conviction in order to support the forfeiture. *Various Items v. United States, supra; cf. Murphy v. United States*, 272 U.S. 630 (1926).

In any event, the property forfeited was found to be contraband and appellants are not entitled to have it returned to them. *United States v. Jeffers*, 342 U.S. 48 (1951); *Trupiano v. United States*, 334 U.S. 699 (1948); *United States v. One Ford Coupe*, 272 U.S. 321 (1926); *United States v. Deane Hill Country Club, Inc.*, 342 F.2d 794 (6th Cir.), *cert. denied*, 381 U.S. 937 (1965); *United States v. $1,058.00 in United States Currency*, 323 F.2d 211 (3rd Cir. 1963).

We do not believe that the District Court should be required to determine the beneficial owners of the "bank" whose wagers constituted the fund available for pay-offs. The agents seized no money or property of the Deans which was not intended for use or used in violating the internal revenue laws.

The petition for rehearing is denied.

APPENDIX D

Order of the Supreme Court of the United States

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D. C. 20543

May 3, 1971

James R. Willis, Esq.
205 Cleveland Transit Bldg.
1404 East Ninth St.
Cleveland, Ohio 44114

Re: *Dean, et al. v. United States,*
No. 8, Oct. Term, 1970

Dear Sir:

The Court today entered the following order in the above-entitled case:

> The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for reconsideration in light of this Court's decision in *United States v. United States Coin and Currency*, 401 U.S. ....., decided April 5, 1971.

Very truly yours,

E. ROBERT SEAVER, *Clerk,*
By [Signature illegible]
Assistant Clerk.

APPENDIX E

Order of the United States Court of Appeals For the Sixth Circuit

(Filed June 28, 1971)

No. 71-1744

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ONE 1965 BUICK, etc., *et al.*,
Defendants,
WILBUR DEAN and DELORES DEAN,
Claimants-Appellants.

Before WEICK, EDWARDS and MCCREE, *Circuit Judges.*

The judgment of the District Court is vacated and the cause is hereby remanded for reconsideration in light of the decision of the Supreme Court in *United States v. United States Coin and Currency,* 401 U.S. ....., decided April 5, 1971.

Entered by order of the Court.

James A. Higgins,
Clerk.

APPENDIX F

Memorandum and Order of District Court

(Filed July 29, 1971)

Civil No. C 65-403

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION.

UNITED STATES OF AMERICA,
Libelant,

vs.

ONE 1965 BUICK SKYLARK, etc., *et al.*

CONNELL, *J.*

UPON CONSIDERATION,

This court finds that there has been probable cause for seizure of the above-listed items in this instant case.

This court finds that the Internal Revenue Service levy on the funds due to Wilbur E. Dean and Dolores C. Dean is correct and proper.

Therefore, pursuant to the levy, the court instructs the United States Marshal to turn over all the above mentioned money including all the mutilated money to the Internal Revenue Service to be applied to the unpaid taxes owed to the Government by Wilbur E. Dean and Dolores C. Dean.

Therefore, the United States Marshal shall turn over all currency, mutilated or otherwise, to the Internal Revenue Service for the partial payment of tax assess-

ments and liens owed to the United States of America by the claimants, Wilbur E. Dean and Dolores C. Dean, pursuant to the levy by Internal Revenue Service on June 28, 1971.

Further, the remaining above-mentioned property is to be returned to the claimants, and storage costs for same shall be paid by the United States Marshal.

In accordance, the motion of the United States Government to dismiss is hereby granted.

IT IS SO ORDERED.

James C. Connell, *Judge*,
United States District Court.

APPENDIX G

Motion to Dismiss and Motion for Distribution of Seized Property

(Filed July 1, 1971)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

(Title omitted in printing)

Now comes the United States of America by and through its United States Attorney, Frederick M. Coleman, and moves this Honorable Court for a dismissal of the United States Government's complaint in the above-captioned forfeiture action and also requests this Honorable Court to direct the United States Marshal's Office to pay the costs of storage and to return to the claimants, Wilbur

E. Dean and Dolores C. Dean, the following described property:

One 1965 Buick Skylark Convertible,
Serial No. 444675H126046

One 1963 Buick 2-Door Coupe,
Serial No. 4J1018231

One 1962 Buick Skylark 2-Door Sedan,
Serial No. 311528512

One Victor Premier Electric Adding Machine,
Serial No. 1640-701

One Victor Premier Electric Adding Machine,
Serial No. 1648-309

One Victor Electric Adding Machine,
Serial No. 2153-323

seized by Internal Revenue Service Agents on or about the 5th day of April, 1965 at the residence of the claimants at 10915 Wade Park Avenue, Cleveland, Ohio.

The plaintiff cites the recent United States Supreme Court decision as authority for the foregoing, *United States v. U. S. Coin and Currency*, decided April 5, 1971, wherein it was held that funds seized by the Internal Revenue Service agents under Title 26, United States Code, Sections 4411, 4412 and 4901, pertaining to gambling taxes, shall be returned to the parties from whom said funds were seized.

The United States of America further moves this Honorable Court for an order directing that the $305,633.26 in currency and the mutilated currency seized, be turned over to the Internal Revenue Service for the payment of tax assessments and liens owed to the United States of America by the claimants, Wilbur E. Dean and Dolores C. Dean, pursuant to a levy by Internal Revenue Service on June 28,

1971, upon the United States Marshal on the funds belonging to Dolores Dean and Wilbur Dean for their unpaid Federal income taxes which have become a lien in the sum of $1,150,266.69.

Frederick M. Coleman,
United States Attorney,
By Donald D. Weisberger,
Assistant United States Attorney.

APPENDIX H

Brief in Opposition to Government's Motion to Dismiss and Motion for Distribution of Seized Property

(Filed July 14, 1971)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

(Title omitted in printing)

In *United States v. United States Coin & Currency,* 401 U.S. ....., the Supreme Court rejected the contention made by the Government, and adopted by the Sixth Circuit (in its consideration of this case), that the *Marchetti*[1] and *Grosso*[2] decisions did not extend to forfeiture proceedings directed against property assertedly used to violate the wagering tax law. To this end, the Supreme Court, in granting certiorari in our case, vacated the judgment of the Sixth Circuit which affirmed this Court's earlier decision, and remanded this cause for reconsideration in the light of their decision.

Granted, the Supreme Court's remand order as directed to the Sixth Circuit, and by that Court to this Court, is clear enough. However, the fact that the issues in our case, as presented to the United States Supreme Court, and argued to the Sixth Circuit, included not only a contention that the *Marchetti* and *Grosso* principles applied to forfeiture proceedings, but the substantial question as to whether (in spite of *Machetti-Grosso*) a search warrant could validly issue for the seizure of property that was supposedly used in a gambling venture conducted without a wagering stamp.

Thus, it is most significant that the record before this Court shows both (a) a disposition by this Court in the forfeiture proceeding, and (b) a definitive resolution of various motions for the return of the property seized incident to the search warrants and the arrest of the Deans. These motions were filed under Rule 41(e) of *The Federal Rules of Criminal Procedure*. Stated another way, this Court's original decision reflects judgments on two independent actions. The crucial question then that perforce emerges is—simply put—whether the government can by the simple expedient of dismissing their six-year old libel action deprive the Deans of substantial property which the Supreme Court has clearly indicated cannot be forfeited to the Government under the circumstances of this case.

In a nutshell then, the Government's position, in quest of an order of dismissal, must reckon with the undeniable thrust of the *Coin and Currency* (*supra*) opinion which, if given full vent, requires that the original seizures in this case be regarded as unconstitutional and the Government's possession thereof indefensible. These indisputable facts the Government obviously feels can be disregarded because the Deans did not pay income taxes accruing *after* the date of the seizures.

In this latter regard, it need only be noted that the original seizures were made on April 5, 1965; whereas, the levy sought to be impressed against these funds was only filed on June 28, 1971—a date that is not only more than six years *after* the seizure, but *after* the Supreme Court's decision in this case. Even this is not all, for aside from the fact that the unconstitutional seizure of, and possession by, the Government of this property has deprived the Deans of their ability to pay the income taxes owed by them, the inclusion of interest and penalties for non-payment seems excessively punitive. This circumstance alone raises even further problems as to the propriety of the figures used by the Government in establishing the extent of the asserted levy itself. The same is true of the immeasurable loss of the beneficial use of the funds and property during this same interval.[3] Still another circumstance being ignored by the Government is the enormous expense entailed by the Deans in vindicating their possessory rights in the various courts. All of this makes the failure of the Government's proposed action to take these factors into account most startling.

More simply put then, the Government's position is that they can circumvent, with impunity, the obvious thrust of mandates issued by the Supreme Court, and Court of Appeals, in this case, by simply dismissing the forfeiture action and laying claim to money (albeit it had been unconstitutionally seized by them) on the basis of a levy that was issued while the seized property was being wrongfully held by them. This action the Government must be contending is justified, in spite of the fact that it was because of their actions the wrongfully impounded

[3]Our position in this regard is strengthened, and the Government's weakened by the consideration that must be given to our efforts as early as October, 1965, to have the monies "invested in U.S. treasury notes as . . . other insured income producing securities."

cars have almost totally depreciated, and the interest alone lost on the money is quite substantial. Thus, when we add to this the Government's actual knowledge of counsel's vested interest the money in exchange for services rendered *prior* to either the assessment or the levy, the oppressive nature of the Government's position becomes even more manifest.

We contend, therefore, that the Court should make a final resolution in this case of the libel action brought against this property by awarding it, unencumbered by any liens, to the claimants who have every intention of paying their taxes.

Also, it is urged that the Court make a final judgment in favor of the Deans on their motion for the return of illegally seized property. As to this property, our contention is that our motion for the return of the property must be treated as an independent action. The rule in such situations as this is that where, as is the case here, the relief being sought (on the basis of a motion under Rule 41(e) of the Rules of Criminal Procedure) is broader than mere suppression of evidence in a criminal prosecution, the action must be so regarded. See *Dibella v. United States,* 369 U.S. 121, and *Carroll v. United States,* 354 U.S. 394 at 405. Cf. *United States v. Rosenwasser,* 145 F.2d 1015.

From these cases it must be clear that an action seeking the return of illegally acquired property can be maintained independent of a criminal action. Hence, in this case since there was a criminal action pending when the motions were originally determined, the belated elimination of such prosecutions should not suffice to eliminate the motions. This is particularly so since it is clear that, unlike the situation in *Parrish v. United States,* 376 F.2d 601, the Government does not intend to present any further

prosecutions against the claimants in which these issues can be raised. In *Parrish,* of course, the Court held that where the issues raised by the motion could be considered as a part of a pending criminal case, the District Court could properly refuse to regard an action for the return grounded both in equity, and on the basis of Rule 41(e), as an independent action. The opposite of this, of course, must be that where there is no such criminal action, it must be regarded and resolved as an independent action on its own merits.

Based on the above syllogism, it is our view that this Court should specifically reconsider the merits of the Deans' motion for the return of the property. In our judgment, the Court's ultimate view should be that it is unthinkable that the Government can arrest persons, seize their property, hold it for years on the basis of an unconstitutional statute, and then in face of being forced to recognize the unconstitutional aspects of the original seizures and their illegal possession, belatedly seek to avoid returning the property by the expedient of dismissing the case. Hopefully, this view will require the Government to forthwith refund the seized property to the rightful claimants.

Respectfully submitted,

James R. Willis, Esq.,
Attorney for Claimants.

APPENDIX I

Reply to the Claimant's Brief in Opposition to Government's Motion to Dismiss and for Distribution of Seized Property

(Filed July 29, 1971)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Title omitted in printing)

COMES Now the United States of America, by Frederick M. Coleman, United States Attorney for the Northern District of Ohio, by Donald D. Weisberger, Assistant United States Attorney, and urges as follows:

In response to the April 5, 1971 decision of the Supreme Court of the United States in *United States v. United States Coin and Currency, Etc.*, ... U.S. ..... (1970), 39 L.W. 3415 and the June 24, 1971 Order of the United States Court of Appeals for the Sixth Circuit, the United States of America moved that the property seized for forfeiture in this case be distributed in accordance with law to the rightful owners and that the case be dismissed. In other words, the seized property must be returned to the persons from whom seized who are Wilbur and Delores Dean of Cleveland, Ohio. The Government motion proposes to do this by turning the seized currency over to the United States of America and in particular, the Internal Revenue Service of the United States Treasury Department to be credited against taxes owed by Wilbur and Delores Dean. The Deans owe over a million dollars in taxes and interest thereon and they are to be given full credit for the payment of $305,633.26 on this tax bill. Approximately $150,000 of the taxes owed by

Wilbur and Delores Dean arose out of personal income taxes obligated prior to April 5, 1965 when the seizure was made. The remainder of the taxes represent the 10% tax on wagers imposed by section 4401 of the Internal Revenue Code of 1954 and also incurred prior to April 5, 1965. The Government further moved that all of the remainder of the property seized from Wilbur and Delores Dean be returned to them and that the United States Marshal's office is to pay the cost of storage.

In returning the above property, the claimants and the Government are relying on the decisions of the Supreme Court in *Marchetti v. United States,* 390 U.S. 39 (1968), *Grosso v. United States,* 390 U.S. 62 (1968) and *United States v. United States Coin and Currency, etc., supra.* In the latter case, referring to the other two, the Supreme Court stated and we quote,

> "In those cases we took pains to make it clear that the Court in no way doubted the Government's power to assess and collect taxes on unlawful gambling activities."

and they went on to again restate the principles outlined in the latter cases and we quote:

> "We indicated that the Government remained free to collect taxes due under the statute so long as it did not attempt to punish the taxpayer for his failure to file the required documents."

Marchetti also held that,

> "The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases, 390 U.S. at page 44."

As for the depreciation of the motor vehicles, we have no sympathy for the claimants. The automobiles were used in furtherance of violations of the Federal Wagering Laws. When someone freely and openly engages in such criminal occupations they should realize that they are facing the hazard of arrest and the hazard of numerous business reverses that would not occur had the occupations been lawful.

As for the interest on the money, that point was fully considered at the early stages of this case while it was before this District Court. The United States Attorney's Office approached the Court with the thought that the currency might be placed, with the agreement of the parties, in an interest-bearing account. This Court noted that problems of jurisdiction would exist if such an account were utilized and the Court reasoned that the United States of America didn't want the interest and the taxpayers, in view of all the circumstances, would not seem to have been entitled to it. Therefore the currency was allowed to remain in a vault intact.

We urge, and have been instructed to so urge by the Department of Justice offices in Washington, D. C. in disposing of cases pursuant to the *United States v. United States Coin and Currency, etc., supra,* that the Order of Dismissal and disposition of the property in this case contain a certificate noting that there was reasonable cause for the seizure in this case. In that event, Section 2465 of Title 28 of the United States Code provides that the claimant shall not be entitled to costs. We think that this provision of Title 28 of the United States Code should also be interpreted to mean that if there was probable cause for the seizure, a claimant would neither be entitled to costs nor to any recovery to make up for the depreciation

of any item of property seized for forfeiture or to damages of any kind at all under the facts of this case.

We are mindful of the fact that the attorneys for the claimants alleged that they have a vested interest in the money in exchange for services rendered prior to either the assessment or the levy. It should be noted in this connection that we are not referring to a fund created by the Attorneys for the claimant so as to entitle them to any type of equitable lien which would have a priority. See *United States v. Brown*, 26 AFTR 2d 70-5788 (W. D. Tex. 1970), aff'd 441 F. 2d 727 (5th Cir. 1971); *United States v. State National Bank of Connecticut*, 421 F. 2d 519 (2nd Cir. 1970); *United States v. Clinton*, 260 F. Supp. 84 (D.C. N.Y. 1966); *United States v. Kuss*, 24 AFTR 2nd 69-5268 (D.C. Pa. 1969). The practice of levying upon funds while in the hands of a United States Marshal to satisfy a taxpayer's Internal Revenue Tax liabilities has long been the custom. See *Simpson v. Thomas*, 271 F. 2d 450 (4th Cir. 1959). The United States Marshal is required by law under threat of the penalty of law to turn such funds over to the Internal Revenue Service. See 26 U.S.C. 6332.

The claimants' references to the decisions of this Court on motions for the return of seized property under Rule 41(e) of the Federal Rules of Criminal Procedure are not relevant and material to the issues which are now under consideration in this case. These questions regarding the return of property are moot. The property is being returned. It is merely the mechanics of the return which disturbs the claimants.

The Government proposes to return the seized currency to Wilbur and Delores Dean by using it to pay a

portion of their Federal taxes. In the claimant's brief, it is suggested that the Deans wished to pay their taxes and will do so but they should not be forced to do so in this manner. The money should be returned to them so that they can then pay in the proper manner. Such a theory seems somewhat ridiculous in view of the criminal nature of the business activities of both Wilbur and Delores Dean in the past.

Respectfully submitted,

Frederick M. Coleman,
United States Attorney,
By Donald D. Weisberger,
Assistant U. S. Attorney.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1473

WILBUR DEAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. A1). The findings and order of the district court (Pet. App. A20-A21) were entered without opinion and are not officially reported.

On the prior appeal, the opinions of the court of appeals affirming a judgment of forfeiture (Pet. App. A2-A14) and denying rehearing (Pet. App. A15-A17)

are reported at 392 F. 2d 672 and 397 F. 2d 782, respectively. This Court's order granting a petition for writ of certiorari, vacating the judgment and remanding the case for further consideration (Pet. App. A18) is reported at 401 U.S. 715.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1972 (Pet. App. A1). The petition for a writ of certiorari was filed on May 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after forfeiture proceedings were vacated and dismissed, the district court erred in directing that currency in the possession of the United States Marshal be surrendered to the Internal Revenue Service pursuant to a tax levy on the Marshal in 1971 for income and wagering excise taxes assessed against petitioners in 1965, 1966 and 1967, when the currency had been seized from petitioners in 1965 in the execution of search warrants issued on probable cause to believe that petitioners were engaged in wagering without having paid the special occupational tax required by 26 U.S.C. 4411.

STATUTES INVOLVED

The Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) * * * any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * *

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) * * * No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

STATEMENT

On April 5, 1965, certain automobiles and other chattels, and $305,633.26 in currency, were seized from petitioners' home in the execution of search warrants issued by a United States Commissioner (R. 31-39).[1] The district court (R. 29, 100) and the court of appeals (R. 80) held that the affidavits supporting these warrants (R. 40-59) established probable cause to believe that petitioners were carrying on the business of accepting wagers without having registered, or having paid a special occupational tax, in violation of Section 4411 of the Internal Revenue Code of 1954. An order of the district court that this property be forfeited to the United States (R. 74-75) was affirmed on appeal (Pet. App. A2-A14), but was vacated and remanded by this Court (Pet. App. A18) for reconsideration in the light of *United States* v. *U.S. Coin & Currency*, 401 U.S. 715.

On remand, the Government filed a motion (R. 90-91) in the district court to dismiss its libel complaint, and requested the district court to order the United States Marshal to deliver the currency to the Internal Revenue Service pursuant to a levy served by the Service on the Marshal on June 28, 1971, for unpaid taxes owed by petitioners in a total amount of $1,150,266.69, including statutory additions to tax.

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[1] "R." references are to the appendix in the court of appeals.

The notice of levy [2] indicates that it was issued on account of the following tax assessments:

Taxable Period	Date of assessment	Kind of tax	Amount of tax	Additions to tax
1961	3-25-66	income	9,877.24	$ 2,531.97
1962	3-25-66	income	57,754.28	15,559.16
1963	3-25-66	income	58,073.55	16,484.97
1964	8-31-65	income	52,586.99	18,340.03
1965	8-21-66	income	15,629.31	4,515.06
4-1-63 to 4-5-65	11-24-67	wagering	755,031.41	143,898.72
		lien fees	2.00	

The district court held that the levy was proper (R. 100) and directed the Marshal to give the currency to the Internal Revenue Service in partial payment of the tax assessments and liens and ordered all other seized property to be returned to petitioners (R. 100). The court of appeals affirmed without opinion (Pet. App. A1).

ARGUMENT

Petitioners' principal contention (Pet. 8-11) is that upon termination of the forfeiture proceeding the impounded currency was not subject to levy and should have been returned. However, the currency was properly subject to levy under the broad authority of 26 U.S.C. 6332. Property of a taxpayer which

[2] A copy of the notice of levy has been lodged with the Clerk of this Court. This document was furnished to the court of appeals and accepted by it as part of the record on appeal. In the district court, petitioners did not dispute the amounts of the assessments or the validity of the levy (Pet. App. A23-A27).

is held in official custody is subject to levy even if its original seizure was illegal. *Cancino* v. *United States*, 451 F. 2d 1028 (Ct. Cl.); *United States* v. *Freedman*, 444 F. 2d 1387 (C.A. 9); *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2), certiorari denied, 366 U.S. 944; *Field* v. *United States*, 263 F. 2d 758 (C.A. 5), certiorari denied, 360 U.S. 918; *Welsh* v. *United States*, 220 F. 2d 200 (C.A. D.C.). In any event, contrary to petitioners' argument (Pet. 5-8), the seizure here, which was made prior to this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, pursuant to warrants issued on the basis of probable cause, was valid. See, *e.g.*, *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), certiorari denied, 402 U.S. 978; *United States* v. *Scaglione*, 446 F. 2d 182 (C.A. 5), certiorari denied, 404 U.S. 941.[3]

Petitioners' contention (Pet. 9) that the assessments constituting the basis for the levy might be erroneous is in substance a request for a declaratory judgment and injunctive relief, both of which are prohibited with respect to tax matters. 26 U.S.C. 7421 and 28 U.S.C. 2201.[4] Petitioners' proper rem-

[3] Petitioners' contention as to the validity of the seizure is based on *United States* v. *U. S. Coin and Currency*, 401 U.S. 715. That decision, however, did not hold the seizure of the property invalid but rather barred its subsequent forfeiture. That issue was mooted in this case by the dismissal of the forfeiture action (Pet. App. A20-A21).

[4] Petitioners' allusion (Pet. 9) to "counsel's vested interest" articulates no basis for a claim having priority over the tax liens in this case.

edy is the filing of a claim for refund of the currency which has been applied in payment of his tax liability. *Flora* v. *United States*, 362 U.S. 145.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1972.

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